

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT ALLEN POOLEY,

Defendant.

No. 2:21-CR-111 WBS

MEMORANDUM AND ORDER RE:
MOTION FOR JUDGMENT OF
ACQUITTAL ON COUNT FIVE

-----oo0oo-----

In Dubin v. United States, 599 U.S. 110, 129-30
(2023), the Supreme Court rejected the government's overly broad
interpretation of the federal aggravated identity theft statute,
18 U.S.C. § 1028A, explaining that "crimes are supposed to be
defined by the legislature, not by clever prosecutors riffing on
equivocal language." (cleaned up). The government, in charging
this defendant with aggravated identity theft under § 1028A, has
once again attempted to extend the reach of this statute beyond
what Congress intended, and beyond what the Supreme Court has

1 held was permissible in Dubin. For this and other reasons, as
2 set forth below, the court must now grant defendant's motion for
3 judgment of acquittal as to Count Five of the Indictment.

4 (Docket No. 143.)

5 I. Aggravated Identity Theft

6 As explained by the Supreme Court in Dubin, § 1028A
7 applies when a defendant "during and in relation to any
8 predicate offense, knowingly transfers, possesses, or uses,
9 without lawful authority, a means of identification of another
10 person." Dubin, 599 U.S. at 115 (cleaned up). The list of
11 predicate offenses includes, among others, wire fraud, and a
12 violation of § 1028A "carries a severe penalty: a mandatory
13 minimum sentence of two years in prison 'in addition to the
14 punishment for the predicate offense,'" which prosecutors can
15 "hold . . . over the head of any defendant who is considering
16 going to trial." Id. at 115, 131.

17 The Court in Dubin noted that this language had been
18 wielded by the government "well beyond ordinary understandings
19 of identity theft," including instances where (1) a defendant
20 made a counterfeit handgun permit for another person at that
21 person's request, (2) unlicensed doctors issued prescriptions
22 that their actual patients would fill at pharmacies, and (3)
23 medical providers mischaracterized the nature of the services
24 rendered to their patients, resulting in inflated reimbursements
25 or reimbursements for ineligible services. Id. at 115-16. The
26 Court ultimately rejected the government's broad reading of the
27 statute "covering any time another person's means of
28 identification is employed in a way that facilitates a crime,"

1 or is only "ancillary" to the underlying crime, as such an
2 interpretation "bears little resemblance to any ordinary meaning
3 of 'identity theft.'" Id. at 122-23.

4 Instead, the Court held that identity theft "is
5 committed when a defendant uses the means of identification
6 itself to defraud or deceive." Id. at 123. Elaborating, the
7 Court explained that under § 1028A, (1) a defendant "uses
8 another person's means of identification in relation to a
9 predicate offense when this use is at the crux of what makes the
10 conduct criminal"; (2) "being at the crux of the criminality
11 requires more than a causal relationship"; and (3) "the means of
12 identification specifically must be used in a manner that is
13 fraudulent or deceptive." Id. at 131-32 (cleaned up). Based on
14 these standards, the Court reversed the Fifth Circuit's decision
15 affirming the defendant's conviction for aggravated identity
16 theft based on Medicaid overbilling.

17 Notwithstanding the Supreme Court's concerns with the
18 government's overly broad interpretations of § 1028A in Dubin,
19 it specifically declined to address the proper interpretation of
20 "without lawful authority," including whether § 1028A applies to
21 situations where a defendant uses another individual's
22 identification with that individual's consent. 599 U.S. at 128
23 n. 8. However, prior to Dubin, the Ninth Circuit had ruled that
24 the term "without lawful authority" encompassed situations
25 "where an individual grants the defendant permission to possess
26 his or her means of identification, but the defendant then
27 proceeds to use the identification unlawfully." See United
28

1 States v. Osuna-Alvarez, 788 F.3d 1183, 1185-86 (9th Cir. 2015).¹

2 In United States v. Brown, No. 22-50158, 2024 WL
3 3631145, *2 (9th Cir. Aug. 2, 2024) (unpublished mem. decision),
4 the Ninth Circuit held, albeit in a non-binding but persuasive
5 decision, that Dubin "did not overrule our cases holding a
6 person could be liable for identity theft without having stolen
7 the identity". Thus, unless and until the Supreme Court should
8 hold otherwise, this court is bound to follow Osuna-Alvarez.

9 Accordingly, the court instructed the jury in this case that the
10 government need not prove the means of identification of another
11 person was stolen or used without the owner's consent. (See
12 Docket Nos. 130 at 16; 153 at 56.) It is with that same
13 interpretation of § 1028A that the court considers the pending
14 motion for judgment of acquittal on Count Five of the
15 Indictment.

16 II. The Charges and Evidence

17 The Indictment in this case charged defendant with
18 four counts of wire fraud (Counts One through Four) and two
19 counts of aggravated identity theft (Counts Five through Six).
20 The government alleged that defendant falsely led skydiver
21 instructor candidates to believe that they could obtain their

22 ¹ Although tandem instructor Yuri Garmashov testified
23 that defendant used his signature without his consent, the
24 court does not find that testimony to be credible and cannot
25 believe that the jurors would have believed Garmashov's
26 testimony if they had been called upon to determine whether
27 defendant used Garmashov's signature without his consent.
28 However, whether the jury accepted his testimony or not is
immaterial because, for the reasons discussed below, the court
concludes that there was insufficient evidence to convict on
Count Five regardless of whether Garmashov consented to
defendant's use of his signature.

1 tandem instructor certifications if they paid him and took his
2 instructor course, when he knew he had been suspended by the
3 respective certifying organizations, the USPA and UPT, and was
4 thus ineligible to teach the course. (Docket No. 1 ¶¶ 27-28.)

5 The case proceeded to what was eventually a seven-day
6 jury trial. During trial, the government put on multiple
7 witnesses who testified that the only reason they came to the
8 Lodi Parachute Center, where defendant worked, was to obtain
9 their tandem instructor certifications, and they believed that
10 they could obtain these certifications by taking the training
11 course taught by defendant.

12 The government also introduced multiple certification
13 forms with the signatures of instructor Yuri Garmashov and
14 evidence that instructors were required to be present for the
15 candidates' training. The implication which the government
16 asked the jury to draw from this evidence was that defendant
17 completed certification forms that were prefilled with
18 Garmashov's signatures for these candidates, even though
19 defendant conducted their training and knew Garmashov was not
20 present during that training. At the conclusion of the trial,
21 the jury returned a verdict of not guilty on the wire fraud
22 charge in Count One, guilty of the wire fraud charges in Counts
23 Two, Three, Four, and Five, and guilty on the charges of
24 aggravated identity theft in Counts Five and Six.

25 III. Defendant's Rule 29 Motions

26 Defendant orally moved for judgment of acquittal under
27 Federal Rule of Criminal Procedure 29 on all counts at the close
28 of the government's evidence, based on multiple grounds. After

1 expressing frustration with having to address arguments raised
2 for the first time orally and without written briefing, while
3 the jury was waiting outside the courtroom, the court denied the
4 motion.² (Docket No. 151.)

5 Defendant then orally renewed his Rule 29 motion at
6 the close of all evidence.³ The court, once again mindful of not
7 keeping the jury waiting too long, and once again expressing its
8 frustration with having to deal with a Rule 29 motion without
9 briefing, took the motion under submission with the intent to
10 rule after the jury verdict, if defendant was convicted, thus
11 preserving the government's ability to appeal if the court
12 eventually granted the motion. (Docket No. 152 at 106, 126-29.)

13 After the jury returned its verdict, the court granted
14

15 ² The court first explained that it was "get[ting] hit
16 at the end of trial for the first time with an argument that I
17 have to decide within a few short minutes while the jury is
18 waiting out there." (Docket No. 151 at 16.) At the end of oral
19 argument on the initial Rule 29 motion, the court reiterated its
20 frustration, explaining that while the parties had made "very
21 good points . . . it's caught me a little flatfooted to rule on
22 some of these things knowing that the jury is waiting out there
23 to come in and never having seen your briefs before today. It's
24 not even in your briefs." (Docket No. 151 at 25.) The court
25 now acknowledges that the Dubin case was briefly discussed in
26 defendant's trial brief, but the parties did not make any motion
27 based on Dubin or discuss the Dubin case with the court until
28 defendant's initial Rule 29 motion.

23 ³ While the court expressed its frustration, it also
24 noted its willingness to consider new arguments or reconsider
25 its prior ruling, explaining "you put me under a lot of pressure
26 on that Rule 29 motion because one of the most interesting
27 things you were arguing wasn't even in your brief, and so I hope
28 I was listening to it for the first time, and there was nothing
to look at. So maybe we could talk about it again, and you
might convince me of something that I missed the first time."
(Docket No. 152 at 106.)

1 the motion for judgment of acquittal on Counts Four and Six.
2 Specifically, the court ruled there was insufficient evidence on
3 Counts Four and Six, the counts involving Morgan Lachlan McKay,
4 for wire fraud and identity theft, "for the reasons that
5 [defense counsel] stated in her arguments," without further
6 discussion. Although defendant had moved for judgment of
7 acquittal on all counts, the court did not discuss Counts Two,
8 Three, or Five, and referred the matter "with regard to the
9 remaining counts" to the probation officer for presentence
10 report, thus implicitly denying the motion as to all other
11 counts. (Docket No. 155 at 2-3.)

12 Defense counsel then stated that they intended to
13 renew the Rule 29 motion in writing "at least to Count Five,"
14 the aggravated identity theft count based on defendant's use of
15 Garmashov's signatures on USPA and UPT paperwork for tandem
16 instructor candidate Kwon. The court expressed its reluctance
17 to grant the motion and noted that the filing of a written
18 motion was "kind of defeating . . . my purpose stated a moment
19 ago" in setting a sentencing date and directing probation to
20 file a presentence report in order to expeditiously proceed to
21 sentencing, but the court acknowledged that defendant
22 nevertheless had the right to file such a motion. (Docket No.
23 155 at 3.)

24 Defendant has now filed a written motion for judgment
25 of acquittal as to Count Five. (Docket No. 143.) Because the
26 parties could not reach an agreement as to a briefing schedule
27 and hearing date, the court set its own schedule and took the
28 motion under submission without oral argument. (Docket No.

1 148.) The motion is now fully briefed, and the court for the
2 first time has had the opportunity to thoroughly review the
3 written briefing and the applicable case law.

4 IV. Sufficiency of the Evidence on Count Five

5 The court recognizes that granting defendant's instant
6 motion for a judgment of acquittal on Count Five may seem
7 inconsistent with the court's prior rulings on defendant's oral
8 Rule 29 motions. However, "it is well settled that disposition
9 of a posttrial motion for a judgment of acquittal is not
10 required to be consistent with a decision on a similar motion
11 before submission of the case to a jury." United States v.
12 Northrup, 482 F. Supp. 1032, 1036 (D. Nev. 1980) (citations
13 omitted). Further, in hindsight, the court's rulings denying
14 defendant's motions for judgment of acquittal on Count Five were
15 made perhaps precipitously, without fully considering
16 defendant's arguments. And upon reflection, those rulings were
17 just plain wrong. There was simply no evidence to sustain a
18 conviction for aggravated identity theft based on defendant's
19 use of Yuri Garmashov's signatures on YongHyeon Kwon's USPA and
20 USPT paperwork.

21 A. Section 1028A's "During and in Relation" Requirement

22 Section § 1028A applies when a defendant "during and
23 in relation to" a predicate offense, "knowingly transfers,
24 possesses, or uses, without lawful authority, a means of
25 identification of another person." The Indictment specifically
26 charges in Count Five that on July 1, 2016, defendant used the
27 signatures of Person 2, later identified as Yuri Garmashov, on
28 the USPA Tandem Instructor Rating Course Proficiency Card and

1 the UPT Tandem Instructor Certification Form for Victim 2, later
2 identified as YongHyeon Kwon, during and in relation to the
3 crime of wire fraud. (Docket No. 1.) The jury instructions
4 more specifically set forth that the government would have to
5 prove that defendant used Garmashov's means of identification
6 "during and in relation to the offense of wire fraud charged in
7 Counts One through Four of the indictment," in keeping with the
8 language of § 1028A. (See Docket Nos. 130 at 16; 153 at 55.)
9 Count One charges wire fraud in connection with an email sent
10 from Fabricio Palomino to Parachute Center on or about June 28,
11 2016. Count Two charges wire fraud in connection with an email
12 from defendant to Fabricio Palomino on or about June 29, 2016.
13 Count Three charges wire fraud in connection with an email from
14 Fabricio Palomino to defendant on or about July 4, 2016.
15 Finally, Count Four charges wire fraud in connection with an
16 email from defendant to USPA and morgan@verticalfilms.com.au on
17 or about August 1, 2016. (Docket Nos. 1, 139.)

18 Notwithstanding these instructions and the jury's
19 verdict, there was no evidence that defendant's use of
20 Garmashov's signatures on Kwon's USPA and UPT paperwork was
21 "during and in relation to" the offense of wire fraud charged in
22 Counts One through Four, as required by the Indictment and the
23 jury instructions. (See Docket Nos. 130 at 16; 153 at 55.)
24 Specifically, there was no evidence that the emails at issue in
25 Counts One through Four were sent to Kwon, that Kwon knew about
26 those emails, or that he had anything to do with them. In other
27 words, the government has not linked defendant's use of
28 Garmashov's signatures on Kwon's paperwork with any of the four

1 underlying wire fraud counts, as the jury instructions require.
2 The government's failure to link the use of Garmashov's
3 signatures on Kwon's paperwork with any of the violations
4 charged in Counts One through Four is therefore a sufficient
5 ground to compel a judgment of acquittal on Count Five.

6 B. The Supreme Court's Requirements in *Dubin*

7 In explaining the elements of § 1028A, the court
8 properly instructed the jury, using direct quotes or
9 paraphrasing of language from *Dubin*, that (1) "[a] means of
10 identification is used 'during and in relation to' a crime when
11 the means of identification is used in a manner that is
12 fraudulent or deceptive" and "is at the crux of what makes the
13 conduct criminal"; (2) the means of identification must be used
14 in a manner that is fraudulent or deceptive "towards the tandem
15 instructor candidates"; (3) "[b]eing 'at the crux' requires more
16 than a causal relationship between the means of identification
17 and the wire fraud offense"; and (4) "[t]he defendant must have
18 used the means of identification itself to defraud or deceive
19 the candidates." (Docket Nos. 130 at 16; 153 at 55-56.)

20 However, there was insufficient evidence as to these
21 requirements for two independent reasons.

22 1. Fraud or Deception Requirement

23 First, there was no evidence presented as to whether
24 Kwon even saw Garmashov's signatures on his paperwork, much less
25 evidence showing that defendant used those signatures to defraud
26 or deceive him. Indeed, there was no evidence that tandem
27 instructor candidate YongHyeon Kwon saw his certification
28 paperwork or even knew Garmshov's signatures were on the

1 paperwork. At best, there was evidence that other alleged
2 victims were aware of the Garmashov's purported signature on
3 their forms, but that did not constitute evidence of what, if
4 anything, Kwon saw or knew. Moreover, one other tandem
5 instructor candidate testified that he did not see his USPA or
6 UPT paperwork, and another candidate testified that he did not
7 know whose signatures were on his paperwork when he first saw
8 it.

9 Meanwhile, the jury was presented with no evidence
10 regarding what documents Kwon saw, whether he saw Garmashov's
11 signatures on any paperwork, or how he may have reacted to any
12 paperwork with Garmashov's signatures. Given the evidence
13 regarding other candidates and the lack of any evidence as to
14 what Kwon saw and knew, there is insufficient evidence that
15 defendant used Garmashov's signatures to defraud or deceive
16 Kwon. See Dubin, 599 U.S. at 123.

17 2. Crux Requirement

18 Second, there was insufficient evidence that
19 defendant's use of Garmashov's signatures was at the crux of
20 defendant's underlying fraud, as required by Dubin. As alleged
21 in the Indictment, defendant's scheme was to get candidates to
22 pay him for tandem instructor courses by representing they could
23 obtain their tandem instructor ratings through his course.

24 (Docket No. 1 at ¶¶ 27-28.) The government argues in opposition
25 to this motion that Garmashov's signatures were used to convince
26 instructor candidates that they had gotten what they paid for,
27 to avoid detection, and to perpetuate the overall fraud scheme.
28 However, by the time defendant used Garmashov's signatures on

1 Kwon's tandem instructor paperwork, Kwon had already paid for
2 the course and any wire fraud was already complete -- he had
3 already been defrauded before the use of the signatures.⁴

4 Actions by defendant to continue the fraud against
5 other candidates cannot be at the crux of defendant's fraud
6 against Kwon. Similarly, actions to avoid detection or prevent
7 Kwon or others from complaining after the fraud has already been
8 completed also cannot be at the crux of defendant's fraud
9 against Kwon. Instead, even at best, the signatures were merely
10 ancillary to defendant's fraud against Kwon. Accordingly, the
11 government's failure to prove that the use of Garmashov's
12 signatures was at the crux of the fraud against Kwon is another
13 basis to compel a judgment of acquittal on Count Five.

14 In the court's view, the government overreached by
15 charging defendant with aggravated identity theft. Once again,
16 the government has contorted § 1028A beyond what Congress
17 intended by adding aggravated identity theft counts to what
18 should be a straightforward wire fraud case. The issue in this
19 case was whether defendant tricked instructor candidates into
20 paying for his course by telling them they could obtain their
21 tandem certifications and credentials through the course, when
22 he knew he had been suspended by the relevant organizations.
23 There was no evidence that defendant's use of Garmashov's
24 signature on Kwon's paperwork played any role in getting Kwon to
25 part with his money.

26
27 ⁴ The government conceded during trial that a conviction
28 on Count Five may not be based on a theory of fraud on the USPA
or UPT.

1 V. Conclusion

2 The court has great faith in lay juries, which are a
3 bedrock of the American criminal justice system. Unfortunately,
4 perhaps due the court's failure to make the elements of an
5 aggravated identity theft charge clearer, it appears that the
6 jury in this case was unable to understand what § 1028A requires
7 under Dubin.

8 Justice Gorsuch's concurrence in Dubin foreshadowed
9 such a result, when he argued that § 1028A was
10 unconstitutionally vague because there was "no sure way" to
11 determine whether a means of identification is at the crux of an
12 underlying fraud, because "[i]n virtually every fraud, a 'means
13 of identification' plays some critical role in the fraud's
14 success." Dubin, 599 U.S. at 133-39. This court also
15 foreshadowed the confusion the jury might have had with Dubin's
16 requirements when it observed during the jury instruction
17 conference that "[t]he language of [] Supreme Court decisions
18 was not meant to be a jury instruction. The Supreme Court
19 writes to educate lawyers, not for juries." (Docket No. 152 at
20 99.) Here, the court did not simply give the Ninth Circuit's
21 pattern instruction on § 1028A but added multiple quotations and
22 paraphrasing from Dubin. Nevertheless, these instructions do
23 not appear to have been enough to enable the jury to properly
24 apply § 1028A to the facts of this case, and it is not clear
25 what other instructions the court could have provided.

26 The jury's confusion as to § 1028A is understandable
27 given the lack of clarity as to its elements after Dubin. As
28 this court has explained in another case, certain questions

1 "laden with conceptual vagaries and undefined legal terms of art
2 [] may well be beyond the capacity of the average juror to
3 understand, much less apply to the facts of a case." Carlton v.
4 Amguard Ins. Co., No. 2:22-CV-02030 WBS DB, 2024 WL 2785521, at
5 *4 (E.D. Cal. May 30, 2024) (citing Joe S. Cecil et al., Citizen
6 Comprehension of Difficult Issues: Lessons from Civil Jury
7 Trials, 40 Am. U. L. Rev. 727, 733-34 (1991)). It appears that
8 unless and until the courts can provide more guidance as to how
9 jurors are to determine whether a means of identification is at
10 the "crux" of an underlying fraud, that concept may be beyond
11 the capacity of the average juror to understand and apply.

12 While the court is loath to overturn the verdict of a
13 properly instructed jury, in certain rare cases it is necessary
14 to do so. For the reasons set forth above, the court concludes
15 that this is one of those cases, and accordingly it must grant
16 the motion for judgment of acquittal on Count Five of the
17 Indictment.

18 IT IS THEREFORE ORDERED that defendant's motion for
19 judgment of acquittal (Docket No. 143) as to Count Five of the
20 Indictment charging a violation of 18 U.S.C. § 1028A(a)(1) be,
21 and the same hereby is, GRANTED. The verdict of guilty on Count
22 Five is hereby set aside. At the time of entering final
23 judgment, currently set for September 30, 2024, the court will
24 impose a sentence only on Counts Two and Three of the
25 Indictment.

26 Dated: September 20, 2024



27 WILLIAM B. SHUBB
28 UNITED STATES DISTRICT JUDGE